IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 444 OF 2005

S.P. Capital Finance Ltd ...Petitioner

V/s.

The State of Maharashtra & Ors ...Respondents

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Mr. C.K. Thomas, Advocate the Petitioner

Mr. A.S. Khan i/b A.S. Khan & Associates, Advocate for Respondent No.2.

Mr. M.S. Mhambray, A.P.P. for the State.

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CORAM: SMT. V.K. TAHILRAMANI, J.

DATE OF RESERVING THE ORDER : 05.08.2005

DATE OF PRONOUNCING THE ORDER : 23.08.2005

P.C.:-

1. Heard the learned advocate for the petitioner i.e. original complainant, the learned advocate for the respondent No.2 to 7 i.e. original accused and the learned A.P.P. for the State.

2. The complainant had filed a complaint against the respondent Nos. 2 to 7 under Section 138 of Negotiable Instruments Act. The said complaint is numbered as C.C. No.1506/S/2003 and it was filed before the learned Additional Chief Metropolitan

Magistrate, 37th Court, Esplanade, Mumbai. The Respondent Nos. 2 to 7 had preferred an application for recalling of process before the learned Magistrate. The learned Magistrate recalled the order of issuance of process. Being aggrieved by the said order, the complainant preferred Criminal Revision Application No.463 of 2004 before the Sessions Court. By order dated 8.10.2004 the learned Sessions Judge dismissed the revision. The main ground on which the revision came to be dismissed was that the learned Sessions Judge was of the opinion that he could not exercise revisional jurisdiction, for want of jurisdiction.

3. In the present case it is seen that the learned Magistrate recalled the process by order dated 24.4.2004, at that time, the decision of the Supreme Court in the case of **K.M. Mathew Vs. State of Kerala and Ors. AIR 1992 SC 2206** was holding the field. Therefore, on 24.4.2004 as the law stood the learned Magistrate had power to recall process. Thus, the learned Magistrate could entertain the application for recalling of process. In this view of the matter, the learned Magistrate entertained the application for recalling of process and the process issued against the respondents came to be recalled. The two decisions in the cases of **Adalat Prasad Vs. Rooplal Jindal and Ors. reported in (2004) 7 SCC 338 and Subramanium Sethuraman Vs. State of Maharashtra**

& Anr 3005 (1) Mh.L.J. 626 are later in point of time to K.M. Mathew. The decision in the case of Adalat Prasad is dated 25.08.2004 and the decision in the case of Subramanium Sethuraman has been rendered after the decision in the case of Adalat Prasad. The learned Magistrate recalled the process on 24.4.2004. In view of the decision in the case of K.M. Mathew, the learned Magistrate on 24.4.2004 had power to recall the process, which power he has exercised. No fault can be found with the learned Magistrate in exercising the power which he had at that time to recall the process. Nothing has been indicated either directly or indirectly in the case of Adalat Prasad that the decision would operate retrospectively and hence, the decision would have to be made applicable to cases which were decided before the decision in the case of Adalat Prasad. Thus, the only question which remains to be examined by the Sessions Court is whether the material was such that the learned Magistrate could have recalled the process or not and whether the process was rightly issued. These are the only aspects which have to be taken into consideration by the Court before whom the order of the learned Magistrate dated 24.4.2004 is challenged.

4. In my view, the order of the learned Sessions Judge dated 8.10.2004 whereby he dismissed the revision on the ground that he could not exercise

revisional jurisdiction, for want of jurisdiction, is an erroneous and incorrect order. The learned Sessions Judge has the power to set aside the order of the Magistrate and if necessary even restore the complaint. It has been so held by the Supreme Court in the case of **Major General A.S. Gauraya and Another Vs. S.N. Thakur and another reported in 1986 Cri.L.J. 1074.** The same view has been expressed by the Supreme Court in the case of **Harischandra @ Sunil Ramaraj Raskar Vs. Kantilal Virchand Vora and Anr. reported in 1998 Cri.L.J. 3754** as well as in the decision of this Court in the case of **Mahendra Indermal Borana Vs. Anil Shankar Joshi reported in 2004 All. M.R.. (Cri.) 1715.**

5. From the observations in para 11 in the case of Major General A.S. Gauraya (supra), it is clear that even if the complaint is dismissed the aggrieved party can move the Sessions Court or High Court in revision. In the present case only process issued against the applicant has been recalled. In view of the order of the Magistrate in effect the proceedings in respect of the respondent Nos. 2 to 7 have come to an end and the complaint in respect of these accused persons came to be an end. In effect the complaint in respect of these persons came to be dismissed. From the decision of the Supreme Court in the case of Major General A.S. Gauraya (supra), it is clear that the Sessions Court can entertain a

revision against such an order.

6. The learned Sessions Judge has also held that in view of the decisions of the Supreme Court in Adalat Prasad and Sethuraman, he has reached the conclusion that the revision filed against the order of the Magistrate is not maintainable in law for the sole reason that the Magistrate has no power to entertain such an application, therefore, according to him the only remedy for the aggrieved person would be under section 482 of Cr.P.C. Thus, according to the learned Sessions Judge, the aggrieved person is not entitled to invoke the revisional jurisdiction of the Sessions Court under Section 397 of Cr.P.C. to challenge the order of the Magistrate.

7. In view of the decision of this Court in the case of **V.K. Jain & Ors. Vs. Pratap V. Padode & Anr reported in Mh.L.J. 2005 (3) 778,** it is clear that revision can be preferred against the order of the Magistrate in respect of order issuing process.

8. In view of all the above facts, I am of the opinion that the order of the learned Sessions Judge dated 8.10.2004 is erroneous and incorrect, hence, it is quashed and set aside. The learned Sessions Judge shall hear the parties afresh and thereafter decide revision application No.463 of 2004 on merits.

9. Writ petition is allowed in the above terms.

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